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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WALLACE LEASK,

Defendant and Appellant.

F048102

(Super. Ct. No. BF108362)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John L. Fielder and Charles B. Pfister, Judges.

Sandra Uribe, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL AND FACTUAL HISTORIES

Appellant Wallace Leask was charged with eight counts of lewd conduct upon a child under the age of 14. (Pen. Code,[1] § 288, subd. (a).) There were three named victims (counts 1, 2, 3, 4, 5, and 6) and one John Doe victim (counts 7 and 8). Pursuant to the terms of a plea bargain, Leask pled no contest to count 7, conditioned upon a maximum prison sentence of six years and an agreement that the remaining charges would be dismissed and no additional charges would be brought against him. The plea was also conditioned on a *Harvey*[2] waiver.

Leask was sentenced to the mid-term of six years. In addition, the court ordered that Leask pay a restitution fine in the amount of $200 (§ 1202.4), a parole revocation fine of $200 (§ 1202.45), a security fee of $20 (§ 1456.8, subd. (a)(1)), a sex offense fine of $200, and an assessment penalty of $500 (§ 290.3). The parole revocation fine was ordered suspended. The court reserved the issue of direct victim restitution (§ 1202.4) for a later hearing.

On May 16, 2005, the court heard evidence on the issue of direct victim restitution. After hearing evidence from mental health professionals regarding the drug addiction and other psychological problems of David S. (the named victim in counts 1 and 2), the trial court ordered that Leask pay to David S.'s father restitution in the amount of $117,548.90 as compensation for the costs of David's treatment.

The facts of the underlying offenses are not relevant to the sentencing issues raised on appeal. Suffice it to say that Leask was a music teacher who allegedly abused several students over a course of years and who has, pursuant to a plea agreement, pled no contest to one count of abuse. The significant facts for purposes of this appeal are those related to the restitution order.

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[1] All further references are to the Penal Code unless otherwise noted.

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

When David S. was between the ages of 12 and 14 (1997-1999), he took drum lessons from Leask. During that time, David did not report any inappropriate behavior by Leask, although he did ask to stop lessons several times. When David was 16, his father learned that David was smoking marijuana. About a year later, when David was 17, David tested positive for drug use and his father sought treatment for David. Local programs proved unsuccessful. David then entered a residential drug rehabilitation program in Tucson, Arizona, and later, one in Port Townsend, Washington. Out-of-pocket expenses for the treatment and related expenses equaled $124,598.90.

When David first entered the Washington program, he claimed his depression and substance abuse began at age 10 years. He falsely reported a family history of substance abuse and psychological illness. David also falsely reported that he abused animals. David's initial response to treatment was not promising. Later, David revealed that he had been abused by Leask. After he reported the abuse, David's treatment progress improved greatly. He admitted that his problems had begun at age 12 and recanted his earlier claims of animal torture and family substance abuse. David's treating psychologist opined that David's substance abuse and depression were symptomatic of post traumatic stress disorder resulting from the molestation.

DISCUSSION

I. Section 1202.4

Leask contends that the $117,548.90 restitution fine ordered to compensate David's father is not authorized under the statute in effect at the time the alleged offense against David S. was committed and must therefore be stricken. (*People v. Birkett* (1999) 21 Cal.4th 226, 232, fn. 4.) We asked the parties to provide this court with supplemental briefing on whether Leask is estopped from raising this issue because he has received the benefit of his plea bargain. Having considered the arguments of the parties, we conclude that he is estopped from raising the issue.

The record reveals that when the trial court took Leask's plea, the court informed Leask that he could be asked to pay counseling costs for any of his victims (those named in the dismissed counts as well as the John Doe victim of count 7). Given the nature of the offense, Leask knew his victims were minors financially dependent on their parents. The crime charged is a violation of section 288, subdivision (a), lewd act with a child under the age of 14. All the victims were abused while taking music lessons from Leask, undoubtedly paid for by a parent or responsible adult. When Leask questioned the court about the maximum amount of restitution he could be ordered to pay, the court informed Leask there would be no limitation on the amount of counseling costs that could be recovered for any of the victims. In addition, it informed Leask that if there was any question about the amount of counseling costs, the victims would be required to substantiate their claims.

At the sentencing hearing, defense counsel objected to the accounting submitted by David's father because there was no link between Leask's acts and the counseling expenses incurred. He argued that, given the lack of a connection between the counseling and what happened to the child, the court could not make an order without an evidentiary hearing. There was no challenge based on the father, not the child, having paid for counseling. After further argument by both counsel, the court acknowledged that Leask did have a right to a hearing on the issue of restitution, but commented, "[i]f there's going to be the equivalent of a trial, then there is no rationale upon which I can justify to myself taking a disposition to save the victims the further pain and suffering …." Acknowledging that the plea bargain substantially reduced the sentence faced by Leask, the court stated that the plea bargain was acceptable to the court only because it prevented "the extreme trauma of a victim coming [into] court and having to testify on this kind of thing." The court unequivocally stated it would not accept the disposition if a restitution hearing were necessary. Both the prosecutor and defense counsel, after consulting with the victims and defendant, came back with an agreement

that the restitution hearing would be limited to the testimony of the professionals and that David would not be asked to testify. Within these parameters, the trial court accepted the bargained-for disposition.

Based on these two hearings, and the exchanges that occurred at each, we conclude that Leask is estopped from raising his challenge to the restitution order on the grounds that it is unauthorized under section 1202.4. Where a defendant has entered a plea in return for a specified sentence, appellate courts are not inclined to find error even if it is determined that the trial court has acted in excess of its jurisdiction when imposing sentence, as long as the court does not lack fundamental jurisdiction.[3] (*People v. Hester* (2000) 22 Cal.4th 290, 295; see also *People v. Jones* (1989) 210 Cal.App.3d 124, 136 [where court is merely acting in excess of its jurisdiction, defendant who agrees to actions may be estopped later from challenging on jurisdictional grounds].) The rationale behind this policy is that defendants who have received the benefit of their bargains should not be allowed to ""trifle with the courts"" by attempting to better the bargain through the appellate process. (*People v. Beebe* (1989) 216 Cal.App.3d 927, 932.)

Although we have not found any case applying the rule to a restitution order, courts have applied the rule in a variety of sentencing scenarios. (See *People v. Hester, supra,* 22 Cal.4th at p. 295 [defendant was precluded from challenging failure to stay execution of sentence under section 654]; *People v. Flood* (2003) 108 Cal.App.4th 504, 508 [three strikes does not apply to sentence]; *People v. Couch* (1996) 48 Cal.App.4th 1053, 1058 [ex post facto claim that defendant was not subject to three strikes law because it was not in effect at the time of his current offense]; *People v. Jones*, *supra*, 210 Cal.App.3d at pp. 136-137 [defendant estopped from challenging erroneous imposition of

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[3]Lack of fundamental jurisdiction means the complete absence of power to hear or determine the case; in other words, an absence of authority over the subject matter or the parties in the case. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.)

a second five-year enhancement under § 667, subd. (a)]; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123 [defendant waived error in computation of sentence which is within court's fundamental jurisdiction and which does not exceed terms of plea bargain].) The courts have also applied the estoppel doctrine where normal waiver principles would not bar a challenge to an unauthorized sentence on appeal.[4] (See *People v. Flood, supra,* 108 Cal.App.4th at p. 508 [although defense counsel did not waive error when trial court failed to determine whether prior conviction was a strike, defendant was estopped from challenging error because he had gained the benefit of his plea bargain].)

We see no reason why the rationale of these cases cannot be applied where the issue is whether the trial court imposed an unauthorized restitution order. There are numerous reasons supporting the extension of the doctrine here. One, Leask received an extremely advantageous benefit from the bargain struck. Initially, he faced a possible 20 years in prison on the six counts. The plea agreement reduced his exposure to six years and prevented the prosecution from adding charges if any additional victims came forward, a likely possibility given the nature of the offense and Leask's access to potential victims. Leask had been self-employed as a music teacher for 30 years. Second, the court expressly advised Leask that he could be required to pay the counseling costs of his minor victims as part of the agreed-upon sentencing. Leask understood this and agreed to it. Implicit in this understanding is that it would not have been the minor victims who paid for their counseling, but their parent or other responsible person or entity.

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[4]We agree that, under general waiver principles, a challenge to an unauthorized restitution order is not waived by a failure to raise the issue at the sentencing hearing. (See *People v. Young* (1995) 38 Cal.App.4th 560, 564.)

Third, when Leask challenged the counseling bill submitted by David S.'s father on the ground that there was no link between the costs and Leask's acts, the court stated it would not accept the disposition and would simply go to trial because it could no longer justify the bargain. In order to save the extremely beneficial bargain, Leask agreed to restrict his challenge to the claimed restitution. By raising the issue on appeal, Leask is attempting to manipulate the system to increase the benefit of the bargain by expanding the challenge beyond that agreed to in the trial court. We are unwilling to go along. (See *People v. Flood*, *supra*, 108 Cal.App.4th at p. 508; *People v. Nguyen, supra,* 13 Cal.App.4th at pp. 122-123 [defendant may not "'trifle with the courts'" by attempting to better the bargain through appellate process].)

Finally, strong public policy supports the application of the estoppel doctrine in this case. Although we do not decide whether the father is an authorized victim under the statute as it existed at the time of the offense, and agree that interpreting the statute as written in 1999 is problematic, we are confident that the Legislature intended that parents of minor children be reimbursed for the costs of seeking treatment for their children when the criminal acts of a defendant cause their children psychological damage. There is a strong public policy and a constitutional mandate that crime victims be provided redress for their injuries. Children are not economically equipped to pay for their own counseling. Given this reality, and the strong policy that criminal defendants make their victims whole, it follows that a parent should be reimbursed for counseling costs. It would make no sense to conclude that only adult victims or parents of children killed by their attackers are entitled to restitution under these circumstances. (See *People v. O'Neal* (2004) 122 Cal.App.4th 817, 821 [given strong policy in California in favor of victim restitution, compensation for those who suffer injuries or incur expenses as a result of an offense is proper regardless of nature of loss]; see also Cal. Const., art. I, § 28 [it is unequivocal intention of people of California that all persons who suffer losses as a

result of criminal activity will receive restitution]; *People v. Broussard* (1993) 5 Cal.4th 1067, 1070-1074 [victim restitution mandated by California Constitution].)

For these reasons, we hold that Leask is estopped from challenging the restitution order to David's father for the cost of David's counseling on the ground that David's father is not an actual victim of Leask's offense. The other issues raised by Leask related to this claim of error are moot.

II. Factual basis

Leask alternatively contends that there is no factual basis for the restitution order because there was not an adequate showing that Leask's acts caused David's substance abuse or psychological problems. Leask's contention lacks merit.

We review the trial court's restitution order for an abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) When there is a factual and rational basis for the amount of restitution ordered, we will uphold the award. (*People v. Baker* (2005) 126 Cal.App.4th 463, 467; *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.) In this case, the testimony of Dr. Hinkle, David's treating psychiatrist, was sufficient to establish a factual and rational basis for concluding that David's counseling was connected directly to the offense. Dr. Hinkle testified that, in her opinion, David's substance abuse and depression were symptomatic of post traumatic stress disorder caused by the abuse. She reported that David's earlier statements were recanted and explained why David might have offered falsehoods initially. She also stated that David's response to treatment was greatly improved after he reported the abuse. Dr. Hinkle indicated that David had told her he began using drugs at age 12 to try and hide from the feelings created by the abuse. The trial court was free to reject the testimony of the defense expert, who, as the court correctly noted, ignored much of the pertinent information in David's medical records and never interviewed David. With respect to the May 29 to May 31 trip where the family visited David in Washington, and for which David's father sought reimbursement, the testimony of David's father is sufficient evidence on which to conclude that the

expense was actually incurred and related to David's treatment. This is true even if the treatment program's records do not show a family visit on those dates.

III. Section 290.3

Leask's final contention is that the trial court improperly assessed a $500 penalty, which was added to the $200 sex offense fine imposed pursuant to section 290.3, subdivision (a). He claims the penalty assessed should have been $340. Respondent concedes the error and we agree. The section 290.3 fine is subject to the penalty assessment provisions of section 1464 and Government Code section 76000. Section 1464 requires that a penalty in the amount equal to $10 for every $10 or fraction of it shall be assessed and added to the section 290.3 fine, an amount equal to $200. Government Code section 76000 provides that an additional penalty of $7 for every $10 or fraction thereof be collected in the same manner as the penalty imposed by section 1464, an amount equal to $140. Reading these two sections together, the sum total of the penalty assessment is $340, not $500. We reduce the penalty and order the abstract corrected. (See *People v. Walker* (1991) 54 Cal.3d 1013, 1029 [proper remedy when excessive fine imposed is to reduce fine to statutory minimum and leave plea bargain intact].)

DISPOSITION

The judgment of conviction is affirmed. The sentence is modified to reduce the penalty assessed pursuant to section 290.3 from $500 to $340 and is affirmed in all other respects. The trial court shall correct the abstract to reflect this modification.

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Wiseman, J.

WE CONCUR:

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Harris, Acting P.J.

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Cornell, J.